1988

Jack S. Cooper v. Deseret Federal Savings and Loan Association : Brief of Respondent

Utah Supreme Court

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Heber Grant Ivins; attorney for plaintiff-respondent.

IN THE SUPREME COURT OF THE STATE OF UTAH

JACK S. COOPER,

Plaintiff/Respondent,

vs.

DESERET FEDERAL SAVINGS AND LOAN ASSOCIATION,

Defendant/Appellant.

Case No. 20,703

BRIEF OF RESPONDENT JACK S. COOPER

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH, HONORABLE GEORGE E. BALLIF

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BRIEF OF RESPONDENT
JACK S. COOPER

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Respondent contends that the issues for review by this Court are as follows:

1. Did the District Court err in ruling that the appellant was estopped from commencing foreclosure against the respondent after more than six years had elapsed from the time of sale of the property, which gave the right to acceleration of the contract by virtue of the due-on-sale provision of the contract?

2. Was the lender estopped from asserting the provisions of the due-on-sale when the original borrower is once again the owner of the collateral, after borrower had foreclosed on the property and repurchased it at sale?

3. Was the District Court authorized to award attorney's fees to the plaintiff-respondent?

STATEMENT OF CASE

The respondent, Jack S. Cooper, was the original borrower from the appellant in April of 1976, and a Trust Deed securing a loan was obtained from the respondent. The Trust Deed contained, among other things, a non-assumption provision.

In May of 1978, respondent sold, by Uniform Real Estate Contract, to one Gary Douglas Ford, trustee, the property securing appellant's loan to respondent. Trial evidence indicated that appellant's file contained an insurance binder dated April, 1979, showing Ford to be the owner of the property, thus putting appellant on notice that the property had been sold. In addition, a Notice of Interest had been filed with the Utah County Recorder. In January of 1982, Ford wrote to appellant and complained of their threat to foreclose unless he agreed to pay a $3,000.00 assumption fee and to pay increased interest (see Exhibit 18). This letter states:

> "I acted in good faith by letting you [Deseret Federal] know of the sale" and "when I initially purchased the property, I went into Orem (upstairs) office and was told by one of the officers (she was in charge of such things as assumptions) that it would be better to 'buy it on contract and then you won't have to pay the assumption fee.' She said that I would have to pay an assumption fee if I 'formally assumed the loan,' but not if I buy it on contract. 'The company [Deseret Federal] isn't going after the contract sales.'"

In June of 1981, the loan was delinquent. The appellant claims to have mailed a due-on-sale notice to the respondent. The respondent denies having received the same, and no proof of delivery was introduced at the time of trial. It was not until June 5, 1984, that a Notice of Default was filed.

In the interim, the property in question had been repossessed by respondent from Ford. At the time the Notice of Default was filed, the original borrower, the respondent, was once again in possession and the owner of the collateral.

Thus, it was in excess of six years after the violation of the due-on-sale provision before the appellant saw fit to file a Notice of Default. It is recognized that during this period Ford was in bankruptcy, with a stay in effect for virtually one year. However, during the remaining five years, the appellant was under no restraint and could have filed a Notice of Default at any time.

SUMMARY OF ARGUMENT

Appellant states in its brief that the District Court erred in ruling that Deseret Federal must have commenced foreclosure of the subject loan within one year after being informed of the violation of the due-on-sale clause under the Trust Deed. This statement is not true; the Court made reference to a one-year period, but such statement is merely dicta, inasmuch as the

fact situation shows that such Notice of Default was not commenced for a period in excess of six years after notification of the sale.

It is further argued that the Court had sufficient grounds under the circumstances to award an attorney's fee in behalf of the respondent.

ARGUMENT

POINT I: DID THE DISTRICT COURT ERR IN RULING THAT THE LENDER WAS ESTOPPED FROM COMMENCING FORECLOSURE AGAINST THE BORROWER, AFTER MORE THAN SIX YEARS HAD ELAPSED FROM THE TIME OF THE ACCELERATION OF THE DUE-ON-SALE PROVISION OF THE BORROWER'S CONTRACT?

The Uniform Commercial Code specifically adopts the principal of estoppel under 70A-1-103, U.C.A. 1953, in which it is stated,

> "Unless displaced by the particular provisions of this act, the principles of law and equity, including law merchant and the law relative to capacity to contract ...estoppel...or other validating or invalidating clause shall supplement its provisions."

It is not argued that the appellant did not have the legal right to enforce the due-on-sale provision based upon any constitutional premise. The theory of the respondent's case is that such action must be taken within a reasonable time, or he is estopped from enforcing the provision.

A Utah case which deals with the acceleration of a contract is Williamson v. Wanlass, 545 P.2d 1145, in which the Court held that

> "The imposition of a severe condition, such as a clause which allows for acceleration in case of default, is not favored in the law, and one who seeks to impose such a condition must not, either by acts or omission, permit another to assume that the covenant will not be strictly enforced, and then 'crack down' on the obligor by rigidly insisting on enforcement without giving some reasonable notice and opportunity to comply.
>
> "Equitable claims or defenses may be asserted and tried along with or against legal claims or defenses in the same action, and equitable principles may be applied in an action at law. The principles of equity and justice are universal and apply wherever appropriate and necessary to enforce rights or to prevent oppression and injustice."

There are numerous cases in other jurisdictions which support the proposition that due-on-sale acceleration clauses, which give the mortgagee or note holder the option to declare the unpaid balance immediately due and payable, are not self-executing, and the option must be exercised before the provision becomes inoperative. If the acceleration provision does not specify any definite time in which the action to accelerate must be exercised, such election must be made within a reasonable time: 69 ALR 3d, 713, 748; Walker Bank and Trust Co. v. Neilson (1971), 26 Utah 2d, 383, 490, P.2d 328; 55 Am.Jur. 2d, Mortgages, Section 373; Malouff v. Midland Federal Savings & Loan Association (1973), 181 Colo. 294, 509 P.2d 1240; Mutual Federal Savings & Loan Association v. Wisconsin Wireworks (1973), 58 Wisc. 2d 99, 205 N.W.2d 762 (stating that the element of laches is arguably present in this case where a land contract was

executed on April 26, 1967, and it was not until more than two and one-half years later, on November 25, 1969, that the lender declared the balance due). Also see Mutual Federal Savings & Loan Association v. American Medical Services in 1974 Wisc. 223, N.W.2d 921. This case upholds the defense of laches where the mortgagee had constructive notice of a transfer and delayed four to six years in seeking to enforce the acceleration provision, during which time interest rates had increased, which would prejudice the mortgagor.

The Malouff case, supra, seems to be a landmark decision and is cited continually. In that case, the Court, on page 1245, stated

> "Malouff's contention was that this open-ended provision authorized an election to accelerate at any time, even years in the future. We do not agree. The prevailing rule is that under an ordinary acceleration clause in a mortgage or trust deed, the obligee has a reasonable time after the default or the event which gives rise to the right to accelerate in which to declare the indebtedness due. Lovell v. Goss, 45 Colo, 304, 101 P. 72; Washburn v. Williams, 10 Colo.App. 153, 50 P. 223; 5 Am.Jur. 2d Mortgages, Section 384. Accordingly, where, as here, no definite time is specified by which the election to accelerate must be exercised, such election to do so must be made within a reasonable time. Here, the election to accelerate was made by Midland within a month after notice of Malouff's refusal to tender the payments required by the Assumption and Modification Agreement. Of course, each case must be considered on its own facts, and, certainly, an election to accelerate a year or years in the future, as hypothesized by Malouff, could not be considered reasonable under ordinary circumstances."

In the case of First Federal Savings & Loan v. Perry's Landing, 463 N.E.2d 636, an Ohio case, on page 648, the Court states

> "The facts underlying the representation must be known to the party at the time he makes it, or at least the circumstances must be such that he is necessarily chargeable with knowledge of them....The due-on-sale clause contained in Paragraph 8 of the First Federal Landing mortgage agreement does not specify a time within which First Federal must assert its right to accelerate payment of the outstanding balance of the mortgage. We hold that, in the absence of a specific time, the lender has a reasonable time following the act or event by the borrower which triggers the terms of the clause to exercise its rights thereunder."

The Court goes on to say that three months is not unreasonable under the circumstances of this case in order to exercise a due-on-sale provision. Therefore, it is obvious that any protracted delay would have been held to have precluded the mortgagee from exercising such rights.

In the case of Dunham v. Ware Savings Bank, 423 N.E.2d 998, on page 100, the Massachusetts court stated

> "Initially, we dispose of the plaintiff's claim that the bank waived its right to accerlate because it did not seek to enforce the clause until approximately three months had elapsed since the transfer. The prevailing rule is that under an ordinary acceleration clause in a mortgage the obligee has a reasonable time in which to elect to declare the indebtedness due. Malouff v. Midland Federal Savings & Loan Association, supra. We do not think that three months is unreasonable, see id. (one month reasonable, but not one year), although we note that once the bank knows or should have known of the transfer, any delay is at its peril."

It becomes obvious from these cases that, although they hold with the mortgagee, under the proper set of facts, with an undue period of time having elapsed from the sale until the notice of default, the results would have been different.

Another disturbing fact involved in this case is that the defendant, Deseret Federal, has accepted sufficient payments from the plaintiff to put the loan in a current status at the present time. This not only enhances their equity where their risk of loss is greatly reduced, but should estop them from continuing with the foreclosure. See Christie v. Guild, 101 Utah 313, 121 P.2d 401.

In a well-reasoned opinion entitled Redd v. Western Savings & Loan Co., 646 P.2d 761, the Supreme Court upheld the due-on-sale clause. However, the Court infers that if the defendant had accepted payments, it would have waived its contractual rights. This statement is made on page 762:

> "Since February, 1980, the defendant has returned all payments tendered by plaintiffs to avoid any waiver of its contractual rights."

This case also seems to hold, on page 766, that the subsequent sale being made on contract with the title retained by the seller would have some significance on the ability of the lender to accelerate the provisions of the contract.

POINT II: THE COURT HAD SUFFICIENT GROUNDS TO AWARD ATTORNEY'S FEES IN BEHALF OF THE RESPONDENT.

This litigation arose when appellant filed a Notice of Default against respondent, claiming that the due-on-sale provision of the Trust Deed had been triggered. This action was taken after the property used as collateral was solely in the name of respondent borrower, and pursued after the loan was brought current. It is certainly within the Court's discretion in a case of equity to allow counsel fees to prevent such foreclosure. It would be unconscionable to force respondent to pay such expenses when the facts are so clear and unequivocal in his behalf.

CONCLUSION

Certainly this Court should not allow a lender to forego action on a due-on-sale provision for more than six years after being notified of sale. It would not be equitable to allow the appellant to watch the fluctuation of the prime rate and gauge its actions to maximize its profits with total disregard for the rights or interests of the borrower.

This Court should permanently enjoin appellant from continuing its foreclosure based upon the sale in May, 1979, and should award respondent attorney's fees.

Respectfully submitted this 24 day of April, 1986.

HEBER GRANT IVINS

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Attorney for Respondent

CERTIFICIATE OF MAILING

I hereby certify that I mailed four (4) correct copies of the foregoing Brief, postage prepaid, this 24 day of April, 1986, addressed as follows:

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